82-7
No. ___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS HEIMBACH, individually and as the Orange County Executive; PETER REPLOGLE, individually and as the Director of the Orange County Employment and Training Administration; JUNE COOK, individually and as former Director of the Orange County Employment and Training Administration; LAWRENCE GASKINS, individually and as an employee of the Orange County Employment and Training Administration and the COUNTY OF ORANGE,

Petitioners,

—against—

HUDSON VALLEY FREEDOM THEATRE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 2, 1982

QUESTIONS PRESENTED

1. Whether a not-for-profit corporation has a racial identity and, therefore, standing to maintain an action for money damages as the direct target of race discrimination in violation of the Fourteenth Amendment of the United States Constitution and Title VI of the Civil Rights Act of 1964 when that corporation was incorporated in order to produce theatrical and artistic productions which particularly reach the Black and Hispanic communities?

2. After this court's decision in *Arlington Heights** does the corporation described above have standing to seek money damages for race discrimination against itself without raising *jus tertii* or joining natural person plaintiffs?

PARTIES BELOW

The caption of the case contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed.

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* *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties Below	i
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:	PAGE
Alabama Power Co. v. Ickes, 302 U.S. 464 (1938)	11
Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1969)	12
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	11
Flast v. Cohen, 392 U.S. 85 (1968)	7
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	11
Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969)	8
National Organization for Women—New York Chapter v. Goodman, 374 F. Supp. 247 (S.D.N.Y. 1974)	9
Regents of the University of California v. Bakke, 436 U.S. 265 (1978)	10, 11
Shlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)	8
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	11
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ___ U.S. ___, 102 S.Ct. 752 (1982)	12
Village of Arlington Heights v. Metropolitan Housing Development Authority, 429 U.S. 252 (1977)	5-12
Warth v. Seldin, 422 U.S. 490 (1975)	11
United States Constitution:	
U.S. Const. Amend. XIV; Due Process and Equal Protection Clauses	9

PAGE

Statutes and Other Authorities:

Civil Rights Act of 1964; Tit. VI, Sec. 601 42 U.S.C. § 2000d 3, 4, 7-11

42 U.S.C. § 1981 3
42 U.S.C. § 1983 3
42 U.S.C. § 1985 3

Comprehensive Employment and Training Act, 29 U.S.C. § 801 *et seq.* 3

Internal Revenue Code, 26 U.S.C. §§ 6103 and 7213 ... 4

28 U.S.C. § 1359 8

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OPINIONS BELOW

The District Court memorandum opinion and order dismissing the complaint in *Hudson Valley Freedom Theatre, Inc. v. Louis Heimbach, et al.* is reported at 513 F.Supp. 250 (S.D.N.Y. 1981) and is set forth in the Appendix at 16a-28a.

The opinion of the U.S. Court of Appeals for the Second Circuit, reversing the District Court in *Hudson Valley Freedom Theatre, Inc. v. Heimbach* is reported at 671 F.2d 702 (2nd Cir. 1982) and is set forth in the Appendix at 1a-10a. The concurring opinion of Pierce, Circuit Judge, is set forth in the Appendix at 11a-13a.

The Court of Appeals denied rehearing by its order entered on April 5, 1982 which is set forth in the Appendix at 30a-31a.

JURISDICTION

On February 1, 1982, the United States Court of Appeals for the Second Circuit rendered the judgment which petitioners seek to have reviewed. On April 5, 1982, that Court denied petitioners' timely petition for rehearing with a suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV; Due Process and Equal Protection Clauses — A.32a[1]

42 U.S.C. § 1981 — A.32a

Civil Rights Act of 1871
42 U.S.C. § 1983 — A.32a

42 U.S.C. § 1985 — A.33a

Civil Rights Act of 1964; Tit. VI, Sec. 601
42 U.S.C. § 2000d — A.35a

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1 References to "A.___" are to appropriate pages of the Appendix to this petition.

STATEMENT OF THE CASE

Respondent Hudson Valley Freedom Theatre, Inc. (hereinafter referred to as "HVFT"), the district court plaintiff, is a not-for-profit tax-exempt corporation organized and existing under the laws of the State of New York and doing business in the Newburgh, New York, mid-Hudson area. HVFT seeks money damages under the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under 42 U.S.C. §§ 1981, 1983, 1985 and 2000d for alleged race discrimination in connection with the disbursement of CETA[2] funds in Orange County, New York. HVFT is the only plaintiff in this action and HVFT expressly rejects (A.3a) all reliance upon the rights of third-party natural persons in bringing its race discrimination claims as a corporation.

HVFT has been in existence since 1972, and it alleges in its complaint that its purpose is "to produce theatrical and artistic productions in Orange County and the mid-Hudson area which particularly reach and involve the Black and Hispanic communities." (A.3a). HVFT further alleges in its complaint that it was incorporated in order to create a theatre which would "reflect the cultural needs, aspirations and creativity of the Black and Hispanic communities of the mid-Hudson area." (A.3a).

Petitioners, defendants in the District Court, are the Orange County executive, Louis Heimbach, and other past and present Orange County officials and administrators who played a part in disbursing CETA funds during fiscal year 1978. HVFT alleges that its application for $188,000 in CETA funds for fiscal year 1978 was not granted due to race discrimination[3] and that certain CETA funding due HVFT was terminated as a

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2 Orange County, through its Employment Training Administration ("ETA") administers a local program under the Comprehensive Employment and Training Act, 29 U.S.C. § 801 *et seq.* (CETA).

3 HVFT also brought a pendent contract claim regarding its CETA funding. The pendent contract claim is not at issue by this petition.

result of race discrimination. Other claims by HVFT which were contained in its complaint to the district court were not renewed on appeal and do not form a basis for this petition.[4]

On May 5, 1981, the United States District Court for the Southern District of New York (Brieant, J.) dismissed the race discrimination claims. The district court held that the corporate plaintiff had no racial identity and no standing to claim money damages as a result of race discrimination because the corporation itself could not be the direct target of the race discrimination alleged (A.23a) and because HVFT expressly declined to raise *jus tertii* (A.24a).

By its judgment entered on February 1, 1982 (A.14a), the United States Court of Appeals for the Second Circuit reversed and remanded, reinstating the corporation's claims of race discrimination under the equal protection clause of the Fourteenth Amendment and under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Judge Pierce concurred in the result in a separate opinion (A.11a-13a). On April 5, 1982, the Court of Appeals denied rehearing and declined Petitioner's suggestion for rehearing *en banc*. (A.30a). This petition for a writ of certiorari followed.

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4 HVFT additionally claimed damages under the Internal Revenue Code, 26 U.S.C. §§ 6103 and 7213, for wrongful disclosure of confidential tax information. The wrongful disclosure claims were dismissed by the district court (A.28a) and that dismissal was not appealed (A.3a).

REASONS FOR GRANTING THE WRIT

A court of appeals has repudiated this Court's axiomatic statement[3] of corporate standing to bring race discrimination claims; imbued a secular not-for-profit corporation with a racial identity[4] of its own; refused to accept the corporate respondent's declination to raise *jus tertii* of natural persons;[7] grafted a new federal remedy onto Title 6 of the Civil Rights Act of 1964 which heretofore vindicated only the rights of natural persons; and then thrice challenged[8] this Court to reverse upon *stare decisis*. Unimpeded by the decisions of this

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5 As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977).

6 According to its complaint the purpose of HVFT is "to produce theatrical and artistic productions in Orange County and the Mid-Hudson area which particularly reach and involve the Black and Hispanic communities," and "which . . . reflect the cultural needs, aspirations and creativity of the Black and Hispanic communities of the Mid-Hudson area."

Hudson Valley Freedom Theatre, Inc. v. Heimbach, 671 F.2d 702, 703 (2d Cir. 1982), (A.3a).

HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds.

Id. at 706, (A.10a).

7 There are no individual plaintiffs and HVFT explicitly affirms that it is suing solely on its own behalf.

HVFT, 671 F.2d at 703, (A.3a).

8 Although a literal reading of one sentence in the *Arlington Heights* opinion indeed supports the [district court] judge's ruling, the sentence was of only academic importance and we do not believe that the Supreme Court would slavishly apply it so as to deny HVFT its day in court.

HVFT, 671 F.2d at 704, (A.5a).

We agree in finding it hard to believe that the Supreme Court would deny standing to the corporation because it "has no racial identity and

Court, the corporate respondent may now continue its race discrimination suit for money damages; yet it need not include as a party even one minority natural person in its action, nor raise the rights of any third-party natural person claimed to be the direct target of the race discrimination alleged in its complaint. Petitioners must return to district court and defend an action brought by a creature of statute now judicially cloaked in the most personal and sensitive of individual traits with which only natural persons were previously endowed.

The District Court relied heavily upon this Court's decision in *Arlington Heights,* and the Court of Appeals devoted a substantial portion of its opinion to a dissection of the *Arlington Heights* holding. Petitioners respectfully submit that in *Arlington Heights,* when it was said that the corporate plaintiff there had "no racial identity and cannot be the direct target of the petitioner's alleged discrimination," 429 U.S. at 263, this Court recognized a necessary characteristic, both of corporate plaintiffs who may not, and of natural person plaintiffs who may stand before our Federal Courts to assert their own rights to be free from race discrimination directed at them.

A corporation's claims of race discrimination are strictly unintelligible without reference to the race and rights of third party natural persons. Thus, after this Court's fundamental statement that a corporation has no racial identity and cannot

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> cannot be the direct target" of the discrimination, while at the same time it would be obliged to deny standing to the stockholders on the sound ground that the injury was suffered by the corporation and not by them.

Id. at 706, (A.9a).

> Thus, we predict that, despite the sentence in the *Arlington Heights* opinion, the Supreme Court would hold that HVFT has standing to assert claims of racial discrimination.

Id. at 707, (A.10a).

be the direct target of race discrimination,[9] its *Arlington Heights* analysis turned to *jus tertii*. The issues which MHDC could litigate on remand involved the rights of others and not any rights of its own[10] but because at least one of those others, an individual plaintiff named Ransom, was actively pursuing vindication of his own rights, the question of MHDC's prudential standing to raise *jus tertii* was not resolved.

In spite of the necessary focus[11] in an analysis of "standing" as suggested by the very imagery of that term, the Court of Appeals in the case at bar reversed upon findings that "HVFT is in a better position than anyone else to challenge discriminatory practices leading to cutting its grant funds. . ." and that "HVFT has a far more solid claim of injury in fact than would

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9 The allegations of HVFT's complaint squarely allege racial discrimination against the corporate plaintiff (A.23a, n.3).

10 Although MHDC had standing in its own right to challenge "arbitrary and irrational zoning actions," 429 U.S. at 263, it could not, due to its corporate nature, raise constitutional claims that the Village of Arlington Heights' refusal to rezone discriminated against MHDC as a racial minority group member. In the strictest sense, MHDC had no Article III standing to claim discrimination against itself as a racial minority group member because MHDC did not possess a racial identity without which any claims of discrimination against itself were illusory. Since HVFT in the case at bar does not make the argument that it is entitled to assert *jus tertii*, 671 F.2d at 705 (A.7a), *Arlington Heights* not only "reads directly on HVFT", 671 F.2d at 705 (A.7a), but it is controlling. In *Arlington Heights*, MHDC's Fourteenth Amendment claims of discrimination targeted at the corporation were not allowed to stand; neither should HVFT's claims remain here. Certainly, HVFT's allegations under the Civil Rights Act of 1964, 42 U.S.C. § 2000d, a statute whose congressional history is steeped in statements of individual rights and whose constitutional authority is provided by the Fourteenth Amendment, should carry no greater weight than the constitutional amendment which gives that statute vitality.

11 "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a Federal Court and not on the issues he wishes to have adjudicated."

Flast v. Cohen, 392 U.S. 85, 99 (1968).

any resident who would have to allege an interest in attending as yet unannounced productions, or a prospective employee who might be only one of many that would seek to apply for positions not yet offered as a result of CETA's denial of the grant." 671 F.2d at 706, (A.10a). Yet prudential standing is not at issue, and HVFT does not raise the rights of any third parties.[12] Thus, we respectfully submit that in this case as in any other "[the] assumption that, if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 227 (1974).

More fundamentally, the Court of Appeals' decision which now grants substantial license to corporations claiming race discrimination is an invitation to the wholesale creation of subject matter jurisdiction. *Cf., Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823 (1969) (assignment of rights collusively created diversity); 28 U.S.C. § 1359. By granting HVFT standing upon the ground of its corporate purpose and upon the intent of its incorporators, the Court of Appeals provided the corporation with a practical racial identity according to the preference expressed in its charter. Might we also look to HVFT's officers, directors, shareholders and employees or to its "constituency" of Hudson Valley theatergoers? The Court of Appeals' reference to HVFT's corporate purpose effectively gave HVFT a racial identity and its judgment was therefore in derogation of *Arlington Heights.*

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12 Although the Court of Appeals twice recited the fact that HVFT raises the right of no third parties, 671 F.2d at 703 and 705 (A.3a and A.7a), see also District Court Opinion, 513 F.Supp. at 254-55, n.3 (A.23a), the Court of Appeals' reasoning inexplicably relies heavily upon examples and analyses of third party rights and of HVFT's posture as a proper prudential plaintiff. Yet HVFT claimed only in its own behalf. Upon the facts of the case at bar, corporations may now bring race discrimination claims in the Second Circuit under 42 U.S.C. § 2000d without raising *jus tertii* whatsoever and without resort to a prudential analysis of corporate standing to raise *jus tertii.*

Race and color are but two of the inherently personal characteristics for which only natural persons may suffer direct injury. It is difficult to conceive a situation where a corporation could sue as the direct object of sex discrimination, age discrimination, discrimination against the physically handicapped, or discrimination on the ground of national origin. Indeed, in *National Organization for Women—New York Chapter* v. *Goodman,* 374, F.Supp. 247 (S.D.N.Y. 1974) a representative organization, "devoted to ending sex discrimination," 374 F.Supp. at 248, was denied standing to speak for its members in a civil rights case alleging sex discrimination in jury empaneling in New York County. May foreign country corporations licensed to do business in the United States now claim discrimination on the ground of race and national origin under the Fourteenth Amendment or the 1964 Civil Rights Act?

In *Arlington Heights,* this Court found that the Article III requirement of injury in fact was met by reason of alleged economic injury and by MHDC's interest in making suitable low-cost housing available in areas where such housing is scarce. Yet the analysis of MHDC's standing never progressed beyond its ability to assert its own rights. The heart of MHDC's claim was race discrimination, and when this Court held that MHDC had no racial identity and could not be the direct target of race discrimination, it held that MHDC, by the very reason of its corporate nature did not possess the rights necessary to maintenance of the discrimination action. The nature of the statutory and constitutional claims in *Arlington Heights* is then rendered of paramount importance in analyzing HVFT's action.

HVFT's claims herein were reinstated by the Court of Appeals under the Fourteenth Amendment and under Title VI of the Civil Rights Act of 1964. In reinstating HVFT's claims under Title VI the Court noted that 42 U.S.C. § 2000d "does not say 'No person in the United States shall, on the ground of *his* race, color or national origin' etc." and then concluded that "we perceive no reason to read it as if it did." HVFT, 671 F.2d

at 705 (A.8a). However, in addressing the statutory language,[13] the Court of Appeals did not acknowledge this Court's leading analysis of the legislative intent underlying Title VI. *Regents of the University of California* v. *Bakke*, 436 U.S. 265 (1978).

Although *Bakke* was presented within the factual context of the remedial use of a racial classification, *Bakke* stands for the proposition that Title VI reaches as far as the Fourteenth Amendment. As a result, the *Arlington Heights* racial identity analysis under the Fourteenth Amendment should apply equally to HVFT's Title VI claims. As the *Bakke* Court found,

> Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.
>
> The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys.

Bakke, 438 U.S. at 284-85. (Footnote omitted).

> Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, but proponents of the bill merely replied that the meaning of "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

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13 The Court of Appeals' statutory analysis was neither briefed nor argued below; the legislative history of 42 U.S.C. § 2000d was not explored nor articulated prior to the Court's *sua sponte* reading of its gender neutral verbiage.

> "As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." [110 Cong.Rec.] at 6553 [(1964)].

Id. at 286-87. (Footnotes omitted).

In light of *Bakke,* Title VI should be recognized as a remedial vehicle for vindication of existing constitutional rights. *Compare Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 618 (1979) (". . . § 1983 does not provide any substantive rights at all. . . . The act only gives a remedy.") with *Bakke.*

In the absence of the Fourteenth Amendment rights HVFT would assert, *Arlington Heights,* and in light of Title VI's congruence with the scope of the Fourteenth Amendment, *Bakke,* Article III is seen as an absolute constitutional bar to HVFT's maintenance of the instant action.

The case at bar presents the pure issue of corporate standing to claim racial discrimination because there is but a single plaintiff, the Hudson Valley Freedom Theatre, Inc. Further, HVFT unambiguously disavows reliance on *jus tertii,* thereby tendering the standing issue with precision and clarity. Significantly, absent special circumstance, "[a litigant] must assert his own legal interests rather than those of third parties." *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979) (citations omitted). ". . . [T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (citations omitted). ". . . [W]here, although there is damage, there is no violation of a right no action can be maintained." *Alabama Power Co. v. Ickes,* 302 U.S. 464, 479 (1938).

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of the federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co. v. Commissioners of Emigration,* 113 U.S. 33, 39 (1885).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ____ U.S. ____, 102 S.Ct. 752, 757 (1982)

The Court of Appeals decision steps beyond constitutionally permissible remedies because it enforces corporate rights which do not exist. Even as the Acts of Congress should not be struck down for failing to meet the Court's standards of social policy, "wisdom" or "common sense", see *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194-195 (1978), the Courts should not stretch the fabric of our Constitution beyond its limitations in order to provide remedies which Congress did not intend. In traditional terms of standing jurisprudence, corporate plaintiffs are not "within the zone of interests to be protected," *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153 (1969), by Title VI from race discrimination. In order for a corporation such as HVFT to allege damage from race discrimination it must identify those natural persons against whom the discrimination is targeted and clearly raise *jus tertii* if those natural persons are not joined in the action.

The Court of Appeals decision herein squarely conflicts with this Court's opinion in *Arlington Heights,* and presents an "unusually broad and novel view of standing to litigate a substantive question in the federal courts," *Valley Forge,* ____ U.S. at ____, 102 S.Ct. at 757. The reasons for granting the writ are compelling and the issue presented is in need of prompt resolution by this Court.

CONCLUSION

The corporate plaintiff which raises no *jus tertii* herein has no standing to claim race discrimination against itself under the Fourteenth Amendment or under Title VI of the Civil Rights Act of 1964 due to its lack of racial identity and lack of corollary constitutional rights; yet the Court of Appeals has spurned this Court's *Arlington Heights* decision and effectively given the Hudson Valley Freedom Theatre, Inc. a racial identity upon which to sue and a forum in which to stand. The issue presented by this petition is unambiguous and unclouded by the presence of third party natural persons to whose rights the Court of Appeals alluded but none of whom are litigants in the action.

The petition for a writ of certiorary should be granted.

Respectfully submitted,

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